Supreme Court, U.S.
FILED
JAN 3 1992
OFFICE OF THE CLERK

No. 91-666

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NORMAN W. SWANSON, *et al.*,
Petitioners,

v.

HELEN A. POWERS, Secretary of the North Carolina Department of Revenue, *et al.*,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITIONERS' REPLY BRIEF

G. EUGENE BOYCE *
DONALD L. SMITH
JASPER L. CUMMINGS, JR.
WOMBLE CARLYLE SANDRIDGE & RICE
P.O. Box 831
Raleigh, North Carolina 27602
(919) 755-2100

CHARLES H. TAYLOR
4295 Shattalon Drive
Winston-Salem, North Carolina 27106
(919) 924-6064
Attorneys for Petitioners

* Counsel of Record

January 3, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
REPLY ARGUMENT	2
I. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH OPINIONS OF THIS COURT AND WITH OPINIONS OF OTHER CIRCUIT COURTS OF APPEAL	2
II. THE FOURTH CIRCUIT'S DECISION IS CONTRARY TO THIS COURT'S AND OTHER COURTS' DECISIONS THAT CLEARLY ESTABLISH THE DOCTRINE OF INTERGOVERNMENTAL TAX IMMUNITY	3
CONCLUSION	6
APPENDIX:	
N.C. Gen. Stat. § 105-257	1a
N.C. Gen. Stat. § 105-453	2a
N.C. Gen. Stat. § 147-88	4a

TABLE OF AUTHORITIES

CASES — Page

Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) 4
Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989) 4, 5
Farid v. Smith, 850 F.2d 917 (2d Cir. 1988) 3
Hafer v. Melo, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991) 2, 3
Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727 73 L.Ed.2d 396 (1982) 4
M'Culloch v. Maryland, 4 Wheat 316, 4 L.Ed. 579 (1819) 5
Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) 2
New York State Club Ass'n v. City of New York, 487 U.S. 1, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988) 2
Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1983) 3
Phillips Chemical Company v. Dumas Independent School District, 361 U.S. 376, 80 S.Ct. 474, 4 L.Ed.2d 384 (1960) 5
Swanson v. State of North Carolina, et al., 911OSC53 (N.C. S.Ct., December 6, 1991) 4

UNITED STATES STATUTES

4 U.S.C. § 111 (1985) 4
42 U.S.C. § 1983 (1985) 2

NORTH CAROLINA STATUTES

N.C. Gen. Stat. § 105-257 (1989) 5
N.C. Gen. Stat. § 105-453 (1989) 5
N.C. Gen. Stat. § 147-88 (1987) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-666

NORMAN W. SWANSON, *et al.*,
Petitioners,

v.

HELEN A. POWERS, Secretary of the North Carolina Department of Revenue, *et al.*,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITIONERS' REPLY BRIEF

STATEMENT OF THE CASE

Respondent has not misstated the facts underlying the instant case but has, through omission, conveniently ignored facts necessary for this Court's proper determination of whether to grant a writ of certiorari to the United States Court of Appeals for the Fourth Circuit. Petitioners set forth all necessary and pertinent facts in their Petition for Writ of Certiorari and, now, readopt and reiterate the facts as stated therein.

REPLY ARGUMENT

I. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH OPINIONS OF THIS COURT AND WITH OPINIONS OF OTHER CIRCUIT COURTS OF APPEAL.

Respondent asserts in her Brief in Opposition at page 5 that this is not a proper case for issuance of a writ of certiorari for the reason that Petitioners failed to identify the presence of any factors required by this Court in deciding to allow the writ. Respondent ignores, however, this Court's recent decision in *Hafer v. Melo*, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991) where it was held that a state official may be held liable in her personal capacity for actions taken pursuant to official duties. This Court stated:

> Through § 1983, Congress sought 'to give a remedy to parties deprived of constitutional rights, privileges and immunities by an officials' abuse of his position'.

Id. at 363 citing *Monroe v. Pape*, 365 U.S. 167, 172, 81 S.Ct. 473, 476, 5 L.Ed.2d 492 (1961).

The Fourth Circuit's decision, under the guise of qualified immunity, apparently rests on reasons contrary to the *Hafer* decision. If this Court were to accept Respondent's reasoning that reliance on a presumptively valid statute or the lack of power of a member of the executive branch to declare a legislative act unconstitutional (Brief in Opposition, pp. 9-10) shields Respondent from liability in her individual capacity, then 42 U.S.C. § 1983 and this Court's decision in *Hafer* are meaningless. Such a ruling would mean that state officials can always escape Section 1983 liability as all statutes are presumptively valid. *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 108 S.Ct. 2225, 101 L.Ed.2d (1988). Petitioners contend that a state official blindly enforcing an unconstitutional statute can be held personally liable to those who have

been deprived of their rights. *See Farid v. Smith*, 850 F.2d 917 (2d Cir. 1988).

In *Farid*, the Second Circuit held that a Section 1983 damage claim would lie against the superintendent of a New York State correctional facility in his personal capacity, despite the fact that all acts complained of were committed pursuant to policies promulgated by the State of New York. The court stated:

> As the Supreme Court had noted, an agent's liability for torts committed by him cannot be avoided by pleading a direction or authorization of the principal. The agent is himself liable, whether or not he has been authorized or even directed to commit the tort.

Id. at 921, citing *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 113, n.23, 104 S.Ct. 900, 79 L.Ed.2d 67 (1983).

The Fourth Circuit's opinion below cannot be reconciled with either *Hafer v. Melo* or the Second Circuit's opinion in *Farid v. Smith*. Respondent should not be allowed to escape personal liability to Petitioners for her unconstitutional collection of taxes despite the fact the taxation was authorized by statute.

II. THE FOURTH CIRCUIT'S DECISION IS CONTRARY TO THIS COURT'S AND OTHER COURTS' DECISIONS THAT CLEARLY ESTABLISH THE DOCTRINE OF INTERGOVERNMENTAL TAX IMMUNITY.

Respondent urges, and the Fourth Circuit held, that the parameters of the constitutional rights at issue were so unclear, at the relevant times, as to allow Respondent to shield her unconstitutional actions with qualified immunity. Respondent and the Fourth Circuit are in error, as emphasized in the Petition for Writ of Certiorari, and this error has deprived Petitioners of a federal remedy to which they are entitled under this Court's previous deci-

sions for the unconstitutional conduct of Respondent. (Cert. Pet., pp. 25-29.)[1]

Respondent argues in her Brief in Opposition that Petitioners do not, because they cannot, cite a single decision before *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989), interpreting the provisions of 4 U.S.C. § 111. This reasoning ignores this Court's express directive in *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). In *Anderson*, this Court stated that the "operation of [the qualified immunity doctrine set forth in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)] . . . depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Anderson* at 639, 107 S.Ct. at 3038, 97 L.Ed.2d at 530. This Court stated further, "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Id.* at 6640, 107 S.Ct. at 3039, 97 L.Ed.2d at 531.

It is true that Respondent did not have the benefit of direct legal precedent construing 4 U.S.C. § 111, but this Court and other courts have spoken definitively on several occasions regarding the exact parameters of federal supremacy as interpreted through the doctrine of intergovernmental tax immunity, the constitutional principal embodied in 4 U.S.C. § 111. (Cert. Pet., pp. 17-18, fn. 45.) It is also true, as Respondent states, that in a number of cases cited by Petitioner the tax at issue was held to be nondiscriminatory. This does not negate the fact that in upholding the taxes then at issue, the various

---

[1] Class A and Class B Petitioners have also been deprived of a state remedy pursuant to the North Carolina Supreme Court's dismissal of the state court action referred to in the Petition for a Writ of Certiorari at pp. 3-4. *Swanson v. The State of North Carolina, et al.*, 9110SC53, North Carolina Supreme Court, December 6, 1991.

courts specifically defined the parameters of intergovernmental tax immunity and that "it still remains true, as it has from the time of *M'Culloch v. Maryland*, 4 Wheat 316, 4 L.Ed. 579, that a state tax may not discriminate against the [federal] government or those with whom it deals." *Phillips Chemical Company v. Dumas Independent School District*, 361 U.S. 376, 387, 80 S.Ct. 474, 481, 4 L.Ed.2d 384 (1960).

Respondent does not refute, and as the trial court specifically held, it has been long held in North Carolina that retirement benefits are compensation. (Cert. Pet., p. 21.) Despite Respondent's argument to the contrary, it is also well-settled that North Carolina National Guard personnel are a component of state government. (Cert. Pet., pp. 22-24.) Respondent does not, and cannot, deny that she knowingly collected taxes from Class A and Class B Petitioners were in excess of those collected from their state counterparts. Respondent is charged by statute with the duty of knowing the law in respect to taxation and advising the North Carolina General Assembly of how this law applies to the State's taxation scheme. *See e.g.*, N.C. Gen. Stat. §§ 105-453 (1989); 105-257 (1989); and 147-88 (1987) (attached hereto in the Appendix and discussed at Cert. Pet. App., p. 26a.) As to the Class B Petitioners, Respondent continued to collect the unconstitutional tax for an additional calendar year after this Court's decision in *Davis*. (Cert. Pet., p. 23.) These facts and the North Carolina precedent cited are alone a basis for denying Respondent the benefit of qualified immunity. (Cert. Pet. App., p. 27a.)

Respondent's claim that she reasonably believed, in spite of well-settled North Carolina law and the well-settled parameters of intergovernmental tax immunity, that her actions in collecting North Carolina's unconstitutional tax were lawful will not withstand scrutiny. The Fourth Circuit's decision in the case *sub judice* is in direct conflict with prior decisions detailing the parameters of the Peti-

tioners' constitutional right not to be taxed in a discriminatory manner, and further conflicts with this Courts' directives regarding the application of qualified immunity as set forth in the Petition for a Writ of Certiorari and as referred to herein.

CONCLUSION

For the reasons stated in the Petition for a Writ of Certiorari and the reasons stated hereinabove, Petitioners respectfully request this honorable Court grant the writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

G. EUGENE BOYCE *
DONALD L. SMITH
JASPER L. CUMMINGS, JR.
WOMBLE CARLYLE SANDRIDGE & RICE
P.O. Box 831
Raleigh, North Carolina 27602
(919) 755-2100

CHARLES H. TAYLOR
4295 Shattalon Drive
Winston-Salem, North Carolina 27106
(919) 924-6064
Attorneys for Petitioners

* Counsel of Record

January 3, 1992

APPENDICES

APPENDIX A

N.C. Gen. Stat. § 105-257. Report to General Assembly on tax system.

The Secretary of Revenue shall biennially make report to the General Assembly, making such recommendations as he may consider useful in improving the tax laws and systems of this State. (1933, c. 88, s. 2; 1955, c. 1350, s. 9; 1973, c. 476, s. 193.)

APPENDIX B

N.C. Gen. Stat. § 105-453. Study of taxation; data for Governor and General Assembly; reports from officials, boards and agencies; examination of persons, papers, etc.

It shall be the duty of the Secretary to make a statistical analysis by groups and by counties of receipts under each Article of the Revenue Act, and to make a thorough study of the subject of taxation as it relates to taxation within and by the State of North Carolina, including cities, counties, and subdivisions, their exercise and power of taxation; and to make a study of the taxation in other states, including the subjects of listing property for taxation, the classification of property for taxation, exemption, and tax collections and tax collecting, and he shall have the power and authority to make a comparative study of the subject of taxation in all its phases, including the relation between State taxation and federal taxation, and said Secretary shall assemble, classify and digest for practical use all available data on the subject of taxation, to the end that the same may be submitted to the Governor and General Assembly and may also be available for all citizens and officials of the State who are interested therein.

To the end that the Secretary of Revenue may properly discharge the duties placed upon him by law, he is hereby accorded the following powers:

(1) He shall have authority to require from the Secretary of Revenue, the Tax Review Board, other State officials, boards, and agencies, and from county tax supervisors, municipal clerks, and other county and municipal officers, on forms prepared and prescribed by the said Secretary, such

annual and other reports as shall enable the Secretary to ascertain such information as he may require, to the end that he may have full, complete, and accurate statistical information as to the practical operation of the tax and revenue laws of the State.

(2) He shall have the same authority as is given the Department of Revenue in G.S. 105-276 to examine persons, papers, and records. (1941, c. 327, s. 4; 1955, c. 1350, s. 12; 1973, c. 476, s. 193.)

APPENDIX C

N.C. Gen. Stat. § 147-88. Duties as to revenue laws.

In addition to the other duties of the Secretary of Revenue, it shall be his duty to prepare for the legislative committees of the General Assembly such revision of the revenue laws of the State as he may find by experience and investigation expedient to recommend, so that the same may be introduced in the General Assembly and available in printed form for consideration of its members within the first 10 days of the session. (1921, c. 40, s. 5; 1973, c. 476, s. 193.)